NO. 20-843

In the
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,

Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of the New York State Police, RICHARD J. MCNALLY, JR., in His Official Capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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The Second Amendment protects "the right of the people to keep *and bear* arms." Both that text and a wealth of historical authority from both sides of the Atlantic confirm that the Constitution enshrines not just a homebound right to keep arms but a right to bear them outside the home, where the need for self-defense is acute. Indeed, the historical record is so overwhelming that the state no longer disputes that the Second Amendment protects the right to carry handguns outside the home for self-defense. While the state treats that concession as a non-event, it contradicts its earlier arguments and fatally undermines the reasoning of the decision the state seeks to preserve. The state now retreats to the equally indefensible claims that the right vanishes in "populous areas" and extends only to those with a "non-speculative need" to exercise it. Those misguided claims depend on ignoring constitutional text and rewriting history through selective quotation, excising from the law books anything that does not fit the state's revisionist narrative, including much of the material relied upon in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The state takes its revisionism so far as to claim there is no example in all Anglo-American history of the carry rights petitioners seek. In fact, at least 43 states allow just that, while, as in *Heller*, only a few jurisdictions follow New York's lead of presumptively denying a right that the Constitution guarantees to all.

When the state is not rewriting the historical record, it is attacking arguments petitioners did not make, while defending a law it did not pass and

licenses it did not issue. The state proceeds as if its law restricts the right to carry only at Yankee Stadium and petitioners demand a right to carry always and everywhere. But very nearly the opposite is true. Petitioners do not challenge any of New York's many separate laws prohibiting handguns in specific, sensitive places. They contest New York's effort to treat virtually the entire Empire State as a sensitive place and to prohibit petitioners from carrying their handguns for self-defense virtually *anywhere*, even (contrary to the state's repeated claims) in remote "back country" areas.

The incompatibility of New York's outlier regime with the text, history, and tradition of the Second Amendment is obvious and suffices to resolve this case. By effecting "a complete prohibition" on carrying handguns outside the home for self-defense via a regime suffused with discretion, the Sullivan Law flunks any applicable level of scrutiny. *Heller*, 554 U.S. at 629. But it speaks volumes that the state does not even try to defend its law under strict scrutiny or as narrowly tailored (even though this Court just reaffirmed that even intermediate scrutiny demands narrow tailoring). The state instead urges the Court to craft a sui generis form of scrutiny that is heightened in name only and far more lax than the scrutiny that applies to invasions of other textually guaranteed fundamental rights. But the Second Amendment is not "a second-class right." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.). The Court should reverse the decision below and hold that petitioners have a right to do what even the state now concedes the Constitution protects: bear arms outside the home for self-defense.

I. Text, History, And Tradition Confirm That The Second Amendment Guarantees A Right To Carry Handguns Outside The Home For Self-Defense.

By its terms, the Second Amendment secures a right not just to "keep" arms, but to "bear" them, a phrase "that refers to carrying for a particular purpose—confrontation." *Heller*, 554 U.S. at 584. Long before and long after the founding, courts and commentators alike recognized that the right to keep and bear arms includes the right to carry common weapons for self-defense. Petr.Br.29-30. And neither the state nor any of its amici has been able to identify a single instance before the twentieth century of someone being successfully prosecuted for the bare act of carrying a common firearm for self-defense. Text, history, and tradition thus speak with one resounding voice: The Second Amendment protects the right to carry a handgun outside the home for self-defense.

In fact, the evidence is so overwhelming that New York has belatedly joined the chorus. After insisting for the better part of a decade that its restrictive carry regime does not even *implicate* the Second Amendment, the state now "do[es] not dispute" that "the Second Amendment embodies a right to carry arms outside the home for self-defense." Resp.Br.19. The state tries to downplay that volte-face, but its view that the Second Amendment is limited to the curtilage was central both to its defense of its regime below and to the Second Circuit's reasoning that the Sullivan Law implicates neither the core of the Second Amendment nor strict scrutiny.

The state now retreats to the position that while the right to carry outside the home for self-defense exists and is textually protected, the state may nonetheless "condition" the exercise of that right "in areas 'frequented by the general public'" on "a showing of a non-speculative need for armed self-defense." Resp.Br.19. That new claim is as textually and historically indefensible as the position the state wisely abandoned, and it does not even suffice to defend the state's actual regime. New York does not restrict the carrying of handguns for self-defense only in areas "frequented by the general public." Resp.Br.19. It prohibits people from carrying handguns for self-defense *anywhere* unless and until they can persuade an "official, high or petty," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), that they have a non-speculative need that distinguishes them from the bulk of "the people" textually guaranteed the same right. Petr.Br.14-18.

While the state claims that petitioners may carry their handguns for "self-defense in 'back country' areas," Resp.Br.16-17, petitioners' licenses actually allow them to carry in "off road back country" *only* "for purposes of ... outdoor activities similar to hunting, for example fishing, hiking & camping." J.A.41; J.A.114. The licenses provide no general authorization to carry for self-defense outside "populous areas," and they virtually never allow carrying solely for the purpose of self-defense, which is central to the Second Amendment.[1] In all events, the state's newly minted

[1] The sole exception is that Koch—but not Nash—may carry "to and from work," even though he pointed to no special dangers associated with his workplace (in the administrative offices of the

position has no more grounding in history or tradition than in constitutional text.

1. The state begins by trying to reconceptualize Northampton-style laws as virtually complete bans on carrying firearms anywhere outside the unsettled frontier. But that claim is squarely refuted by text, history, and tradition. Indeed, across centuries of history pre- and post-dating the Second Amendment, the state cannot identify a single case in which Northampton or its progeny was successfully invoked to prosecute someone for the bare act of carrying a common firearm in public for self-defense. Not one. That is unsurprising since the King's Bench authoritatively interpreted Northampton to prohibit only going armed "to terrify the King's subjects" just before the English Bill of Rights was adopted. *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686); *Rex v. Sir John Knight*, 90 Eng. Rep. 330, 330 (K.B. 1686).

The state tries to blunt the force of *Knight's Case*, deriding the *English Reports* as "cursory summaries." Resp.Br.24 n.13. But scores of this Court's decisions—including *Heller*, 554 U.S. at 578—have sensibly relied on the *English Reports*. *See, e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 379-82 (1996); *Bram v. United States*, 168 U.S. 532, 547 (1897). After all, it was those *Reports*—cursory or otherwise—not any additional detail or obscure sources unearthed centuries later, that informed the original public meaning of the Second Amendment on

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state court system) and sought and was denied a right to carry for self-defense more broadly. J.A.114.

this side of the Atlantic. And both accounts in the *English Reports* could not be clearer: Knight was charged with violating Northampton because he "walk[ed] about the streets armed with guns, and … went into the church of St. Michael, in Bristol, in the time of divine service, with a gun." 87 Eng. Rep. at 76; *accord* 90 Eng. Rep. at 330. Knight was acquitted nonetheless because Northampton requires "*malo animo*," or ill intent, 90 Eng. Rep. at 330, and there was no evidence that he "[went] armed to terrify the King's subjects," 87 Eng. Rep. at 76; *see also* Firearms Policy Coalition Amicus Br.22-25; Professors of Second Amendment Law Amicus Br.10-13. Both the fact of and the reported grounds for Knight's acquittal are impossible to square with the state's revisionist assertion that "the 'appear[ance]' of wrongful intent arose from the very act of carrying firearms in populous areas." Resp.Br.24 n.14.

The King's Bench was hardly alone in confirming that Northampton required ill intent and that ill intent could not be inferred from the mere act of carrying common arms in populous places. Hawkins wrote in 1716 that there was "no Danger of Offending against this Statute by wearing common Weapons ... for their Ornament or Defence" because "no wearing of Arms is within the meaning of [Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 136, §9 (1716). Only wearing unusual or terrifying weapons was an offense that self-defense did not "excuse." *Id.* And Coke opined only that self-defense did not excuse the distinct offense of going armed "before the Justices of the Kings Bench," a sensitive place in which the need for

self-defense was distinctly unlikely to arise. Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* 161-62 (1797).

The state is thus forced to resort to selective and misleading quotations from sources decidedly lesser-known now and at the framing. For instance, the state invokes Michael Dalton for the proposition that the "carrying of arms was widely understood" in England to be an affray of the people, Resp.Br.22, but omits Dalton's clarification that carrying arms could constitute "an Affray and Fear of the People, and a Means of the Breach of the Peace" only if one went "armed *offensively*, or with an *unusual* Manner of Servants or Attendants." Michael Dalton, *Country Justice* 380 (1727) (emphasis added). And the state invokes Joseph Keble for a (pre-*Knight's Case*) claim that anyone carrying a pistol could be arrested, Resp.Br.22, but omits his critical clarification that Northampton condemned only the carriage of "Armour or Weapon which is not *usually worn*." Joseph Keble, *An Assistance to Justices of the Peace, for the Easier Performance of Their Duty* 147 (1683) (emphasis added); *see also* Leider Amicus Br.2-4, 8-19; Firearms Policy Coalition Amicus Br.22-25. When quoted in full, even the state's own sources—neither of which merited a mention in *Heller*'s exhaustive survey of relevant historical materials—refute its central claim.

2. Even if the state could cobble together some modicum of support among obscure English barristers, the relevant question is how Northampton and the right to keep and bear arms were understood *in early America.* And early American sources uniformly shared the view espoused by (among others)

the King's Bench, Hawkins, and Blackstone (all of whom, unlike Dalton and Keble, were familiar names in early America). James Wilson explained that wearing arms could be prohibited only if the arms were "dangerous and unusual." 2 *The Works of James Wilson* 399-400 (James DeWitt Andrews ed. 1896). So too did Tucker, and Humphreys, and virtually every other authoritative source to address the question. *See, e.g.*, 5 St. George Tucker, *Blackstone's Commentaries* 149 (William Young Birch & Abraham Small eds. 1803); Charles Humphreys, *Compendium of the Common Law in Force in Kentucky* 482 (1822); Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. Sidebar 97, 101-02 (2009) (collecting sources); Leider Amicus Br.2-4, 8-19; Professors of Second Amendment Law Amicus Br.14-16, 24-25. Early American cases discussed in *Heller* likewise confirm that the founding generation understood Northampton to prohibit only the carrying of a "weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people." *State v. Huntly*, 25 N.C. 418, 422-23 (1843); *see also Simpson v. State*, 13 Tenn. 356, 359-60 (1833); Petr.Br.33.

Once again, the state responds with truncated citations and misdirection. It first invokes post-ratification "legal reference guides" that purportedly "advised local officials to 'arrest all such persons as in your sight shall ride or go armed.'" Resp.Br.23 (quoting John Haywood, *A Manual of the Laws of North-Carolina* pt. 2, at 40 (3d ed. 1814)). But the state excises a critical caveat that made clear that Haywood was not advocating a dragnet: Local officials were, in fact, advised to arrest only those who "shall

ride or go armed *offensively*." Haywood, *supra* at 40 (emphasis added); *see also* John Niles, *The Connecticut Civil Officer* 12 (1823) (advocating arrest of "those who go about armed with dangerous or offensive weapons, to the terror and disquiet of the people"); *id.* 146 (similar); James Davis, *The Office and Authority of a Justice of the Peace* 13 (1774) (specifying that going armed "among any great Concourse of the People" was grounds for arrest only if done "with unusual and offensive weapons").

The state is no more faithful in describing early American Northampton-style laws. Virginia did not provide that going "'armed by night []or by day, in fairs or markets,' or 'in other places' where people congregated … *would be deemed* 'in terror of the Country.'" Resp.Br.33 (emphasis added). Inspiring such terror was a distinct requirement: "[N]o man, great nor small, … [shall] go nor ride armed by night nor by day, in fairs or markets, or in other places, *in terror of the county*." 1786 Va. Acts 35, ch. XLIX (emphasis added). In fact, every early American Northampton-style law contained language confining the offense to going armed "offensively," or "to the terror of the people," or some comparable variant that squared those laws with the pre-existing right, which explains the complete absence of prosecutions for mere carrying of ordinary arms for self-defense. *See* Second Amendment Foundation Amicus Br.6-7, 9 (collecting laws).

As for colonial New Jersey, its 1686 anti-dueling statute (which predated the 1689 English Bill of Rights) generally prohibited only the "private[]" (*i.e.*, concealed) carry of "unusual or unlawful weapons."

1686 N.J. Laws 290, ch. IX. By contrast, its restriction on "rid[ing] or go[ing] armed with sword, pistol, or dagger" applied only to "planters," *id.*—reflecting the kind of selective targeting that motivated New York's Sullivan Law and many other efforts at disarmament. *See* David B. Kopel & George A. Mocsary, *Errors of Omission: Words Missing from the Ninth Circuit's* Young v. Hawaii, 2021 U. Ill. L. Rev. Online 172, 181 n.72 (2021) ("Many New Jersey 'planters' of the time were Scotch-Irish immigrants, a group often disdained by the English."). Moreover, what is most striking about the New Jersey law is that it stands in splendid isolation, and this Court has already declined to "stake [its] interpretation of the Second Amendment upon a single law, in effect in a single [jurisdiction]." *Heller*, 554 U.S. at 632.

The state tries to ground its contention that the right to carry was a rural right confined to the countryside in a handful of nineteenth-century state laws that, it claims, only "authorized public carry during long-distance travel." Resp.Br.25 (citing *Eslava v. State*, 49 Ala. 355, 357 (1873); 1821 Tenn. Pub. Acts 15). But those laws dealt only with *concealed* carry; those same states had robust *open* carry rights without comparable restrictions. *See State v. Reid*, 1 Ala. 612, 619 (1840); *Aymette v. State*, 21 Tenn. 154, 155 (1840); *Andrews v. State*, 50 Tenn. 165, 187 (1871). Those laws are thus of no aid to the state, which makes it crime for petitioners to carry handguns for self-defense in any manner, whether openly or concealed.

Moreover, the state continues to ignore the authority that cuts against it. Patrick Henry went

armed in town on his way to court in early America, John Adams defended the right to go armed in Boston, and Thomas Jefferson requested that arms be brought to him in the District. *See Grace v. District of Columbia*, 187 F.Supp.3d 124, 137 (D.D.C. 2016). By the state's lights, all of these founding fathers were scofflaws.

Straying even further afield, the state invokes rules about when firearms could be *used* for self-defense. Resp.Br.25. But those laws just reinforce that citizens had a baseline right to carry arms for self-defense, as the arms did not materialize from thin air. A state that has deprived the citizenry of the means of armed self-defense has little need to regulate the circumstances in which armed self-defense is lawful.

3. The state next tries to portray New York's restrictive carry regime as a successor to nineteenth-century "surety" laws, which it misleadingly labels "reasonable cause" laws. Resp.Br.26-27, 33-34. But *no* state had a nineteenth-century law requiring a citizen to demonstrate "'reasonable cause' to carry a concealed firearm in populous areas." Resp.Br.34. Surety laws worked the opposite way: They required a magistrate to find "reasonable cause" that someone had demonstrated a propensity to *misuse* a firearm to cause "injury, or breach the peace," before a surety could be demanded to *continue* carrying it. *See, e.g.*, 1836 Mass. Laws 748, 750, ch. 134, §16; Second Amendment Foundation Amicus Br.20-25 (collecting laws). These laws thus reinforced the understanding that the people had a baseline *right* to carry arms, and that only *abuse* of that right could justify its

restriction. Petr.Br.32; *see also Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017).

The state claims that a surety could be demanded of anyone who sought to carry a firearm in a public place because "background law provided that merely carrying firearms in populous areas breached the peace." Resp.Br.27. But its sole support for that essential claim is an unavailing *supra* reference to Messrs. Dalton and Keble. Moreover, the state's characterization of the surety laws is at war with its characterization of Northampton-style laws as categorically prohibiting the carrying of firearms in "populous areas." Several states (including Massachusetts) had both sets of laws, and the surety laws permitted someone to carry a firearm upon payment of a surety even after a magistrate found "reasonable cause" to believe he might misuse it. *See* Second Amendment Foundation Amicus Br.22-23. If the state's view of Northampton were even close to correct, then the surety laws would have been worse than redundant, as the only people who would have been permitted to lawfully carry firearms in populous places would have been those with a demonstrated propensity to misuse them. That is ahistorical nonsense. In reality, both sets of laws targeted bad actors who intentionally misused firearms to terrorize the public, making both sets of laws mutually reinforcing and fully consistent with the pre-existing right enshrined in the Second Amendment and with all the history surveyed in *Heller*.

If the surety laws resembled the state's description or were even routinely enforced, let alone enforced to restrict the use of firearms for self-defense,

then surely they would have merited at least a mention in *Heller*. After all, the *Heller* Court did not confine its historical survey to laws addressing keeping firearms in the home. *Heller* discussed, at great length, a series of nineteenth-century restrictions on the public carrying of firearms and extolled the decisions vindicating the right to carry common arms for self-defense (and not just in rural backwaters). *See, e.g.*, *Bliss v. Commonwealth*, 12 Ky. 90, 92 (1822); *Simpson*, 13 Tenn. at 359-60; *Reid*, 1 Ala. at 619; *Aymette*, 21 Tenn. at 155; *Huntly*, 25 N.C. at 422-23; *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Chandler*, 5 La. Ann. 489, 490 (1850); *Andrews*, 50 Tenn. at 187. While the state derides these cases as "from the Antebellum south," *Heller* treated them as evidence of "a national consensus on the meaning of the Second Amendment," Resp.Br.27. *See* 554 U.S. at 585 & n.9, 629.[2]

Against all the authorities that informed the ratification of the Second and Fourteenth Amendments, the state offers a motley assortment of late nineteenth-century cases, territorial laws, and city ordinances. Resp.Br.4, 28. But the state

[2] The United States tries to distinguish these cases as "disapprov[ing] restrictions on openly carrying long guns," not handguns. U.S. Amicus. Br.29. That claim is both irrelevant after *Heller*, *see* 544 U.S. at 629, and wrong. *Andrews* struck down a prohibition on carrying revolvers. 50 Tenn. at 186-87, 171. *Nunn* struck down a statute insofar as it prohibited the open carry of pistols. 1 Ga. at 246, 251. *Bliss* struck down a prohibition on the concealed carry of pistols. 12 Ky. at 92. And *Simpson* held that the legislature could not impose "any qualification whatever as to [the] kind or nature" of arms that could be borne for defensive purposes. 13 Tenn. at 360.

acknowledges that those cases "relied on the since-abrogated view that the right to bear arms related only to military service." Resp.Br.28; *Salina v. Blaksley*, 72 Kan. 230 (1905) (upholding Dodge City ordinance based on that now-discarded view). The laws and ordinances may have been passed by lawmakers acting on the same (mis)understanding and at any rate had little practical effect. One was held unconstitutional in a decision rejecting the same city-country distinction the state urges here. *See In re Brickey*, 70 P. 609, 609 (Idaho 1902) (holding that legislature lacked "power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages"). There is no record that the Wyoming law was ever enforced. And Tombstone allowed open carry within the city (and did not transform itself into a model of safety by prohibiting concealed carry). Tombstone, Ariz. Ordinance 9 (Apr. 19, 1881). That this is all the state could muster underscores that its draconian carry regime is a historical outlier that is fundamentally incompatible with *Heller* and the individual right protected by the Second Amendment.

II. New York's Restrictive Carry Regime Violates The Second Amendment.

The state mistakenly attributes to petitioners the extreme position of insisting on a right to carry anywhere and everywhere. In reality, it is not petitioners, but the state that stakes out an extreme position, and it does so out of necessity, for the Sullivan Law is an extreme law. It creates a baseline assumption that carrying handguns for self-defense is

a crime, puts the burden on law-abiding citizens to prove that they are "'distinguishable from ... the general community'" in order to exercise their constitutional rights, and vests government officials with virtually unbridled discretion to grant or withhold what the Constitution presumptively guarantees to all. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) (quoting *Klenosky v. N.Y. City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)). None of that is remotely constitutional.

First, the Constitution creates a baseline that "the people" have a right to "keep and bear arms." The state cannot flip that script by presumptively denying them their right to bear arms unless and until they can show an especial need to exercise a right guaranteed to all. To be sure, individuals can forfeit their rights through affirmative misconduct. Thus, consistent with the surety laws and broader historical practice, violent felons may be denied the ability to keep and bear arms. But just as the First Amendment abhors a prior restraint, the state cannot start with the proposition that ordinary law-abiding citizens may not carry handguns. The Second Amendment itself confers a right, not a privilege to be extended by states. Thus, the Sullivan Law starts on the wrong (and unconstitutional) foot by beginning with the presumption that New Yorkers may not carry handguns for self-defense.

Things only go downhill from there. The state's refusal to grant petitioners' licenses to carry handguns for self-defense *precisely because* they are ordinary members of "the people," not some especially worthy

"subset," is fundamentally incompatible with the notion that the Second Amendment secures a right to bear arms for self-defense to "the people"—a phrase that *Heller* explained "unambiguously refers to all members of the political community, not an unspecified subset." 554 U.S. at 644. The Free Exercise Clause is not reserved for those in especial need of salvation; nor is the right to petition limited to the especially aggrieved. The Second Amendment cannot be limited to those with an unusual need for self-defense. Just as the District of Columbia's law prohibiting ordinary members of "the people" from possessing handguns could not be reconciled with an individual right to *keep* arms for self-defense, New York's de facto ban prohibiting ordinary members of "the people" from carrying handguns cannot be reconciled with the individual right to *bear* arms for self-defense. That makes this an open and shut case under any form of scrutiny.

The state suggests that its regime is not as restrictive or demanding as it seems, claiming that citizens need only "[d]istinguish[]" themselves "from the general community" via a "proffer[]" of "facts that are particular to the individual." Resp.Br.10. But citizen after citizen has been denied a license to carry for self-defense, despite having proffered highly "particularized" facts, with court after court upholding the denials. *E.g.*, *Baldea v. City of N.Y. License Div. of NYPD*, 2021 WL 2148769, at *1 (N.Y. App. Div. May 27, 2021); *Theurer v. Safir*, 254 A.D.2d 89, 90 (N.Y. App. Div. 1998); *Kaplan v. Bratton*, 249 A.D.2d 199, 201 (N.Y. App. Div. 1998); *Milo v. Kelly*, 211 A.D.2d 488, 488-89 (N.Y. App. Div. 1995). Petitioner Nash is a case in point. His application identified "a string of

recent robberies in his neighborhood," Pet.App.7, which is surely a proffer particular to him, yet he was still denied a license to carry for self-defense for failure to satisfy the "good cause" requirement.

Worse still, the state cannot and does not dispute that its regime at its core is highly discretionary. To the contrary, it embraces that discretion, portraying it as a variant of prosecutorial discretion, and even going so far as to boast that the Sullivan Law "reviv[ed] the model of allowing individuals to go armed only with 'the king's special licence.'" Resp.Br.4, 29 (quoting 4 Calendar of the Close Rolls, Edw. I, 1296-1302, at 318 (Sept. 15, 1299, Canterbury)). But there is an obvious difference between giving law enforcement officers discretion to enhance liberty by declining to enforce a criminal prohibition, and giving licensing officials discretion to decide which citizens may exercise a fundamental right protected by the Constitution. The former is in keeping with the American tradition, which errs on the side of liberty; the latter is antithetical to it. Our country has never looked kindly on regimes that entrust fundamental constitutional rights to the vast and largely unreviewable discretion of local officials. *E.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 162 (2002); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 (1988).

That skepticism should apply with particular force when it comes to the rights expressly protected by the Second Amendment. Disarmament of the entire populace has understandably never appealed to the entire populace. But the selective disarmament of the disenfranchised and downtrodden—or "persons

outside the political community of the time," to borrow the federal government's phrase, U.S.Br.7—has a long tradition reflected even in the English Bill of Rights, which protected the rights of all "subjects" to petition the king, but only the rights of "Subjects which are Protestants" to "have Arms for their Defence." 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441. And when such overt discrimination became unsustainable, discretion filled the gap, allowing officials in the Jim Crow South and the Know-Nothing North to effectively restrict the right to possess arms for self-defense to "Subjects which are Protestants" and other worthies, while denying those constitutionally protected rights to the newly freed or the newly arrived. The Sullivan Law and the discretion it grants licensing officials is a product of that unworthy and unconstitutional history.[3]

The state gets nowhere by claiming that some untold number of *other* applicants persuaded *their* licensing officers to issue them licenses. That just underscores that the discretion that suffuses the Sullivan Law is not applied consistently throughout the state. The state fares no better with its suggestions that, at least in some localities, a healthy percentage of *applicants* receive a license, and that the Court could remand for a determination of the precise percentage. The state is focused on the wrong

[3] The state's effort to deny the law's discriminatory roots is yet another failed exercise in revisionist history, as the amicus brief from Italo-Americans Jurists and Attorneys well documents. The state can try to rewrite history, but it cannot rewrite contemporaneous *New York Times* reports, which aptly capture the Sullivan Law's discriminatory purpose and effect. Petr.Br.13-15, 42-43.

denominator and the wrong issue. The relevant denominator is not limited to applicants—*i.e.*, the hardy few who applied for a license despite all the flaws in the Sullivan Law—but includes all who would exercise their Second Amendment rights under a constitutional regime. No remand could reconstruct the number of New Yorkers who were deterred from even applying for a license because of their inability to demonstrate that they face a greater need for self-defense than their fellow law-abiding New Yorkers.

Moreover, the relevant question is not why (or how many) others were granted a license to carry for self-defense, but why petitioners were denied one. The sole justification the state has offered—that petitioners do not really *need* to exercise that fundamental right—plainly does not suffice. No one would think the state could vest local officers with largely unreviewable authority to decide who really *needed* to attend Mass, buy books, or confront the witnesses against them. Nor would anyone care how many others were allowed to exercise their rights with the state's blessing. The Second Amendment is no different. *See McDonald*, 561 U.S. at 767-80.

It is little surprise, then, that the state does not even try to argue that its law could survive strict scrutiny or narrow tailoring. It instead urges the Court to employ an unrecognizable form of scrutiny that is "intermediate" in name only. Whereas the government bears the burden of proof under intermediate scrutiny, *see, e.g.*, *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017), the state would have courts treat restrictions on Second Amendment rights as presumptively *valid*, Resp.Br.38. Whereas

the government is owed no deference on whether a law unnecessarily infringes on constitutional rights under intermediate scrutiny, *see, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997), the state would have courts largely defer to legislature's purported "discretion to devise and adopt … solutions" to "the 'problem of handgun violence,'" Resp.Br.38. Whereas intermediate scrutiny requires narrow tailoring, *see, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 486 (2014), the state would have courts ask only whether a restriction on Second Amendment rights is "substantially related to an important governmental objective," Resp.Br.39—a test the Court rejected just this past Term in a case the state barely mentions, *see Am. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2385 (2021).

The state's aversion to narrow tailoring is understandable, as nothing about its law is targeted at individuals or circumstances that pose a heightened threat to the state's supposed interests. Unlike nineteenth-century surety laws, the Sullivan Law is not limited to those with a demonstrated propensity to misuse firearms. Even law-abiding citizens are wholly disabled from carrying a handgun for self-defense unless they can demonstrate that they face an extraordinary threat. Nor is the Sullivan Law a genuine "time, place, and manner" restriction, which still would have to satisfy narrow tailoring. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Under New York law, the time when a handgun may be carried outside the home for self-defense (as opposed to hunting or target-practice) is never, the place is

nowhere, and the manner is not at all. That is an evisceration, not a regulation, of the right.[4]

With no argument that its law is even remotely tailored, the state resorts to the familiar refrain that "empirical evidence" demonstrates an association between laws that "restrict public carry" and "lower rates of gun-related homicides and other violent crimes." Resp.Br.43-45. Petitioners vigorously dispute that claim,[5] but there is no need for this Court (let alone any lower court) to resolve that dispute. The same was said of handguns in *Heller*, yet the Court made clear that the District could not ban them even if doing so would have public safety benefits because the relevant tradeoffs were settled by the Second Amendment. 554 U.S. at 635-36.

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[4] The state's effort to invoke the "secondary effects" doctrine is equally unavailing. Resp.Br.40 (emphasis omitted). That doctrine allows a state to supplement its permissible ends (to include combatting secondary effects), but does not excuse a state from tailoring its means to that end, which is the Sullivan Law's fatal flaw.

[5] Only a handful of states have "subjective-issue regimes such as New York's," Arizona, et al. Amicus Br.5, and they are not among the nation's safest. *See id.* at 4-19 (detailing data showing that such laws "plainly do not accomplish—and even detract from—the objective of increased public safety"); Law Enforcement Groups Amicus Br.4-25; William English Amicus Br.2-34. Moreover, the striking recent increase in violent crime in places like New York, *see* "The Spike in Shootings During the Pandemic May Outlast the Virus," *N.Y. Times* (updated Aug. 1, 2021), https://nyti.ms/3vbQoX0, while carrying regimes remain constant, strongly suggests that violent-crime rates turn on other factors, including a range of policy choices that, in contrast to the right to keep and bear arms, the Constitution leaves to the state's discretion.

The state's effort to dust off the empirical arguments found unavailing in *Heller* is just one of many respects in which its position and the Sullivan Law are fundamentally incompatible with *Heller*. *Heller* recognized that the right to keep and bear arms for self-defense in case of confrontation is absolutely central to what the Second Amendment protects. Yet New York licenses petitioners to carry handguns for hunting and target-shooting, while denying the same individuals the same firearms for self-defense. *Heller* recognized that the Second Amendment protects an individual right available to the people and not a narrow subset. Yet New York continues to treat carrying arms as a privilege that it may extend to a fortunate few in the discretion of local government officials. *Heller* recognizes that outlying laws that are antithetical to the basic judgment reflected in the Second Amendment are unconstitutional under any level of scrutiny. Yet New York continues to insist that a law that by design restricts a right guaranteed to all to a narrow subset satisfies even what it calls heightened scrutiny.

This Court thus could decide that New York's law is simply inconsistent with *Heller* and the individual right to keep and bear arms for purposes of self-defense that the Court recognized there. Or the Court could decide that the only remotely comparable antecedents of New York's law were the very few laws that attempted to deny any outlet for the constitutional right to carry and were quickly invalidated, and thus that text, history, and tradition all condemn New York's approach. Or the Court could make clear that strict scrutiny or, at a minimum, narrow tailoring is required, and is wholly absent in

the state's regime. But any way the Court approaches the issue, the fate of the Sullivan Law is crystal clear: It cannot be squared with the individual right that pre-dated the Constitution and was guaranteed to the people, no matter their race, religion, or surname, in the Second Amendment.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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